

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION**

U.S. BANKRUPTCY COURT  
NORTHERN DISTRICT OF TEXAS  
**FILED**  
TAWANA C. SMALL, CLERK  
THE DATE OF ENTRY IS  
ON THE COURT'S DOCKET

**IN RE:**

**BETH THOMAS**

**Debtor**

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**Case No. 02-33965 HDH-13**

**MEMORANDUM OPINION ON DEBTOR'S CLAIM OBJECTION**

This matter is before this Court on an objection filed by the Debtor to the claim of Midland Mortgage Company ("Midland") as servicing agent for Midfirst Bank, which was originally filed on July 2, 2002, and subsequently amended on October 10, 2002 (the "Claim"). Midland filed its claim as a secured claim in this bankruptcy case without sufficient documentation to support its Claim. Beth Thomas ("Debtor") timely filed an objection to Midland's claim, asserting that the claim was unsecured and challenging the amount of the claim.

Midland responded to the objection. On June 26, 2003, this Court conducted a hearing on the claim objection. The Debtor and Debtor's counsel testified in support of Debtor's claim objection. Though the claim objection clearly raised the issue of the validity of Midland's lien and the amount of the claim as well as the lack of evidence of Midland's agency status, Midland did not call a witness to establish (1) that Midland holds a valid lien, (2) the amount of such claim, if any, or (3) its agency status.

Debtor's case set forth specific payments made to Midland for which credit was not given and also challenged certain unsupported charges of Midland. The Debtor admitted liability on the note and that she was 29 payments in arrears. Midland offered no evidence to contravene Debtor's testimony regarding the amount of the claim.

At the end of the hearing, the Court disallowed all of the “charges” by Midland because the charges lacked any supporting evidence. The Court also gave the Debtor credit for the payments she testified had not been credited to her account by Midland. The Court reduced the arrearage amount to the equivalent of 29 payments (rather than the 30 payment arrearage claimed by Midland). With respect to the issue of the validity of the lien, Midland did not offer evidence, either by documentation or testimony of a witness, that clearly established the existence of a lien on the Debtor’s property. However, the Court gave Midland the opportunity to prepare and file an evidentiary affidavit that would clearly establish that Midland is the owner and holder of a secured claim against the Debtor, and further allowing the Debtor to respond.

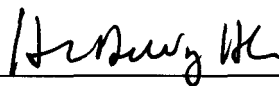
Midland timely filed an affidavit. The Debtor timely responded to the affidavit, arguing that the Midland had failed, once again, to provide adequate supporting evidence of its lien. The Court agrees with the Debtor. After reviewing the affidavit, the Court believes Midland has not established that it is the owner and holder of a secured claim against the Debtor. For example, the affidavit of Thad Burr does not swear that Midland is in possession of the original note, nor, in the alternative, does the affidavit set forth facts that would entitle Midland to enforce a copy of the note. The copy of the note attached to Midland’s affidavit does not show a chain of endorsements ending with Midfirst Bank. No evidence was produced to establish Midland’s agency status with respect to Midfirst Bank, the alleged holder of the note and deed of trust. The affidavit lacks various powers of attorney that are necessary to connect the chain of title. And, as the Debtor points out, the affidavit and the various dates of assignment have numerous discrepancies.

A proof of claim is *prima facie* evidence of the claims validity. *See*, Fed. R. Bankr. P. 3001(f); *In re O’Connor*, 153 F.3d 258, 260 (5<sup>th</sup> Cir. 1998). If a party timely objects to the proof of

claim and rebuts the *prima facie* effect, the creditor must prove the validity of the claim. *See, O'Connor*, 153 F.3d at 260. "Once a debtor has objected to a claim, the creditor is on notice that full participation in the confirmation proceedings is required or its lien will be at risk." *In re Howard*, 972 F.2d 639, 642 (5<sup>th</sup> Cir. 1992). Upon receiving the objection in this case by the Debtor, Midland timely responded, and its counsel appeared at the hearing. However, Midland chose not to offer a witness to establish the secured nature or the amount of the claim. The Court allowed Midland a last opportunity to prove its secured claim by allowing Midland to file the affidavit. The affidavit offered falls short as it does not aver facts sufficient to show that Midland owns and holds the original note or that predicate facts exist to enforce a copy. Therefore, Midland has not shown, by a preponderance of the evidence, that it is the holder of a secured claim. Debtor's objection on this point is sustained.

Debtor's counsel should prepare an order which disallows the charges of Midland, credits the payments as noted in open court, and, further, treats Midland's claim as unsecured.

Signed this 23 day of July, 2003.



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**Harlin D. Hale**  
**United States Bankruptcy Judge**